



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

JUN 16 1983

OFFICE OF  
WATER

MEMORANDUM

SUBJECT: Procedures for Processing Fundamentally Different  
Factors Variances

TO: Regional Water Management Division Directors

FROM: Martha G. Prothro, Director *Martha Prothro*  
Permits Division (EN-336)

Questions have recently been raised concerning the procedures for processing fundamentally different factors (FDF) variances. Additionally, there have been indications that these procedures are not being followed in some instances where deviations from national effluent guidelines are being considered or allowed by National Pollutant Discharge Elimination System (NPDES) States.

The NPDES regulations at 40 CFR §§124.62-124.63 contain the procedures for processing variances. A copy of these provisions is attached. Permits, or portions of permits, containing provisions incorporating variances may not be effective until the regulatory provisions have been satisfied. In the case of FDF variances, the Regions may deny FDF variances without the approval of EPA Headquarters (40 CFR §124.62(c)). However, approvals of FDF variances and alternative limitations must be made by the Director, Office of Water Enforcement and Permits (OWEP) (40 CFR §124.62(d)).

If you have any questions on this matter, please call me (FTS 755-2545), or have your staff call Bill Jordan, Chief, NPDES Technical Support Branch (FTS 426-7010) or Gary Hudiburn of his staff (FTS 755-0750).

Attachment

cc: Bruce R. Barrett (EN-335)  
Steven Schatzow (WH-551)  
Colburn T. Cherney (LE-132W)  
Jeffery D. Denit (WH-552)

ed by a stay under this section  
ided that no such extension shall be  
sted which would:

- (1) Result in the violation of an applicable statutory deadline; or
- (2) Cause the permit to expire more than 1 year after issuance under § 124.15(a).

**Note.**—Extensions of compliance schedules under § 124.60(f)(2) will not automatically be granted for a period equal to the period the stay is in effect for an effluent limitation. For example, if both the Agency and the discharger agree that a certain treatment technology is required by the CWA where guidelines do not apply, but a hearing is granted to consider the effluent limitations which the technology will achieve, requirements regarding installation of the underlying technology will not be stayed during the hearing. Thus, unless the hearing extends beyond the final compliance date in the permit, it will not ordinarily be necessary to extend the compliance schedule. However, when application of an underlying technology is challenged, the stay for installation requirements relating to that technology would extend for the duration of the hearing.

(g) For purposes of judicial review under CWA section 509(b), final agency action on a permit does not occur unless and until a party has exhausted its administrative remedies under Subparts E and F and § 124.91. Any party which neglects or fails to seek review under § 124.91 thereby waives its opportunity to exhaust available agency remedies.

#### 51 Final environmental impact statement

No final NPDES permit for a new source shall be issued until at least 30 days after the date of issuance of a final environmental impact statement if one is required under 40 CFR § 6.805.

#### § 124.62 Decision on variances.

*(Applicable to State programs, see § 123.25 (NPDES)).*

(a) The Director may grant or deny requests for the following variances (subject to EPA objection under § 123.44 for State permits):

- (1) Extensions under CWA section 301(i) based on delay in completion of a publicly owned treatment works;

- (2) After consultation with the Regional Administrator, extensions under CWA section 301(k) based on the use of innovative technology; or

- (3) Variances under CWA section 316(a) for thermal pollution.

(b) The State Director may deny, or forward to the Regional Administrator with a written concurrence, or submit to EPA without recommendation a completed request for:

- (1) A variance based on the presence of "fundamentally different factors" than those on which an effluent limitations guideline was based;

- (2) A variance based on the economic capability of the applicant under CWA section 301(c);

- (3) A variance based upon certain water quality factors under CWA section 301(g); or

- (4) A variance based on water quality related effluent limitations under CWA section 302(b)(2).

(c) The Regional Administrator may deny, forward, or submit to the EPA Deputy Assistant Administrator for Water Enforcement with a recommendation for approval, a request for a variance listed in paragraph (b) of this section that is forwarded by the State Director, or that is submitted to the Regional Administrator by the requester where EPA is the permitting authority.

(d) The EPA Deputy Assistant Administrator for Water Enforcement may approve or deny any variance request submitted under paragraph (c) of this section. If the Deputy Assistant Administrator approves the variance, the Director may prepare a draft permit incorporating the variance. Any public notice of a draft permit for which a variance or modification has been approved or denied shall identify the applicable procedures for appealing that decision under § 124.54.

#### § 124.63 Procedures for variances when EPA is the permitting authority.

(a) In States where EPA is the permit issuing authority and a request for a variance is filed as required by § 122.21, the request shall be processed as follows:

- (1) If at the time that a request for a variance is submitted the Regional Administrator has received an application under § 124.3 for issuance or renewal of that permit but has not yet prepared a draft permit under § 124.6 covering the discharge in question, the Regional Administrator, after obtaining any necessary concurrence of the EPA Deputy Assistant Administrator for Water Enforcement under § 124.62, shall give notice of a tentative decision on the request at the time the notice of the draft permit is prepared as specified in § 124.10, unless this would significantly delay the processing of the permit. In that case the processing of the variance request may be separated from the permit in accordance with paragraph (a)(3) of this section, and the processing of the permit shall proceed without delay.

- (2) If at the time that a request for a variance is filed the Regional Administrator has given notice under § 124.10 of a draft permit covering the discharge in question, but that permit has not yet become final, administrative

proceedings concerning that permit may be stayed and the Regional Administrator shall prepare a new draft permit including a tentative decision on the request, and the fact sheet required by § 124.8. However, if this will significantly delay the processing of the existing draft permit or the Regional Administrator, for other reasons, considers combining the variance request and the existing draft permit inadvisable, the request may be separated from the permit in accordance with paragraph (a)(3) of this section, and the administrative disposition of the existing draft permit shall proceed without delay.

- (3) If the permit has become final and no application under § 124.3 concerning it is pending or if the variance request has been separated from a draft permit as described in paragraphs (a) (1) and (2) of this section, the Regional Administrator may prepare a new draft permit and give notice of it under § 124.10. This draft permit shall be accompanied by the fact sheet required by § 124.8 except that the only matters considered shall relate to the requested variance.

#### § 124.64 Appeals of variances.

(a) When a State issues a permit on which EPA has made a variance decision, separate appeals of the State permit and of the EPA variance decision are possible. If the owner or operator is challenging the same issues in both proceedings, the Regional Administrator will decide, in consultation with State officials, which case will be heard first.

(b) Variance decisions made by EPA may be appealed under either Subparts E or F, provided the requirements of the applicable Subpart are met. However, whenever the basic permit decision is eligible only for an evidentiary hearing under Subpart E while the variance decision is eligible only for a panel hearing under Subpart F, the issues relating to both the basic permit decision and the variance decision shall be considered in the Subpart E proceeding. No Subpart F hearing may be held if a Subpart E hearing would be held in addition. See § 124.111(b).

(c) *Stays for section 301(g) variances.* If a request for an evidentiary hearing is granted on a variance requested under CWA section 301(g), or if a petition for review of the denial of a request for the hearing is filed under § 124.91, any otherwise applicable standards and limitations under CWA section 301 shall not be stayed unless:

- (1) In the judgment of the Regional Administrator, the stay or the variance sought will not result in the discharge of